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Supreme Court, U.S.
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No. 09-1393

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN ENDICOTT,

Petitioner,

v.

ICICLE SEAFOODS, INC.,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the State of Washington

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a Jones Act defendant have a right to demand a jury when a seaman elects to proceed in a state court forum pursuant to the saving to suitors clause, where the law of the chosen forum allows for either party to elect a jury trial?

PARTIES TO PROCEEDING

Justin Endicott, the Petitioner, moved for leave to proceed *in forma pauperis* pursuant to Rule 39. Icicle Seafoods, Inc., the Respondent, opposes the Petition for Writ of Certiorari pursuant to Rule 39.5.

CORPORATE DISCLOSURE STATEMENT

For the purposes of Rule 29.6, Icicle Seafoods, Inc. does not have any parent companies, subsidiaries, or affiliates that are publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

1. The Consequence of Choosing the Forum Under the Jones Act. 5

2. The Washington State Supreme Court's Opinion Does Not Conflict With Dice. 7

3. There is No Conflict Between the Washington State Supreme Court Opinion and the United States Courts of Appeal That Have Considered the Jones Act Jury Question. 9

4. There Is No Conflict Between Decisions of the United States Courts of Appeal. 10

5. There is No Split Between the State Courts of Last Resort That Have Considered the Jones Act Jury Question. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

Bowman v. Am. River Transp. Co., 547 U.S. 1040 (2006) 3

Bowman v. American River Transport Co., 838 N.E.2d 949 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006) ..... passim

Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) ..... passim

Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359 (1952) 3, 7, 8

Endicott v. Icicle Seafoods, Inc., 224 P.3d 761 (Wash. 2010) 2, 3, 13

Flunker v. U.S., 528 F.2d 239 (9th Cir. 1975) 8

Gbotra v. Bandila Shipping, Inc., 113 F.3d 1050 (9th Cir. 1997) 9, 10, 12

Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992), cert. denied, 506 U.S. 975 (1992) ..... passim

Madruga v. Superior Court of Cal., 346 U.S. 556 (1954) 1

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988) 8

More v. Dept. of Retirement Sys., 137 P.3d 73 (Wash. Ct. App. 2006) 8

Peters v. City of San Francisco, 1995 AMC 788 (Cal. Ct. App. 1994) 4, 13

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 7

Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986) 10, 11, 12

The Hine, 71 U.S. (4 Wall.) 555, 18 L. Ed. 451 (1866) 6

Wilmington Trust v. U.S. District Court, 934 F.2d 1026 (9th Cir. 1991) 5, 6

Wingerter v. Chester Quarry Co., 185 F.3d 657 (7th Cir. 1999) 12

Federal Statutes

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1333 7

28 U.S.C. § 1333(1) 1, 5, 7

46 U.S.C. § 30104 ..... 1, 6, 7

Rules & Regulations

Article III, section 2 of the United States Constitution 5

Cal. R. of Court 8.1115(a) 5, 13

Fed. R. Civ. P. 38(e) 5

Fed. R. Civ. P. 9(h) 6, 11

Supreme Court Rul 10(c) 2

Supreme Court Rule 10(b) 2, 14

JURISDICTION

The Supreme Court of Washington issued its opinion on January 7, 2010, vacating the judgment below and remanding for a new trial. A mandate was issued to the trial court on February 3, 2010. Review of a state court decision by the United States Supreme Court is limited to final judgments or decrees. 28 U.S.C. § 1257(a). The United States Supreme Court does not have jurisdiction as further proceedings are now before the state trial court and there is no final judgment or decree.

STATEMENT OF THE CASE

On January 20, 2006, Mr. Endicott brought suit against Icicle Seafoods, Inc. ("Icicle") in the trial court of the state of Washington pursuant to 28 U.S.C. § 1333(1), the saving to suitors clause,[1] for injury claims associated with his employment. These claims were brought under the Jones Act, 46 U.S.C. § 30104, and the traditional maritime doctrine of unseaworthiness.

Icicle demanded a jury trial, but Mr. Endicott moved to strike that demand, asserting that a Jones Act plaintiff has the exclusive right to demand a jury. The trial court granted Mr. Endicott's motion and the case was tried to the bench. The trial court found for Mr. Endicott on his Jones Act and unseaworthiness claims and

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[1] The saving to suitors clause allows a state court to "adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." Ghotra v. Bandila Shipping Co., 113 F.3d 1050, 1054 (9th Cir. 1997) (quoting Madruga v. Superior Court of Cal., 346 U.S. 556, 560-61 (1954) (internal quotations omitted)). In other words, the saving to suitors clause allows seamen to pursue their maritime claims in state courts.

awarded damages. Icicle appealed, arguing that the trial court erred in striking its jury demand.

On January 7, 2010, the Washington State Supreme Court issued its unanimous decision in this case, holding in relevant part that where the Jones Act seaman pursues claims in Washington state court, both the plaintiff and the defendant are entitled to demand a jury. Endicott v. Icicle Seafoods, Inc., 224 P.3d 761 (Wash. 2010). The Washington State Supreme Court held that the Jones Act litigants' right to demand a jury trial depended on the rules of the plaintiff's chosen forum. Since Mr. Endicott chose to pursue his claims in Washington state court, both the plaintiff and the defendant were entitled to demand a jury based on Washington procedural rules and state constitutional protections. The judgment of the trial court was vacated and the case is presently remanded to the trial court for a jury trial.

SUMMARY OF THE ARGUMENT

Review by this Court is not warranted because the Washington State Supreme Court's opinion does not satisfy the requirements of either Supreme Court Rule 10(b) or 10(c). The Washington State Supreme Court's opinion is in fact in harmony with the decisions of this Court as well as the United States courts of appeal and the state courts of last resort that have considered this Jones Act jury issue.

On March 27, 2006, this Court declined to review the Illinois Supreme Court's Bowman v. American River Transport Co., 838 N.E.2d 949 (Ill. 2005), cert.

denied, 547 U.S. 1040 (2006) opinion that involved the very same question at issue here. Bowman v. Am. River Transp. Co., 547 U.S. 1040 (2006). The only court of last resort to address this question since March 27, 2006, is the Washington State Supreme Court in this case. No United States court of appeals has since addressed the issue. As noted below, the Washington State Supreme Court unanimously adopted the reasoning of the Illinois Supreme Court in holding that a Jones Act defendant's entitlement to a jury trial was determined by the procedural rules and constitutional protections of the plaintiff's chosen forum. Accordingly, there have been no developments in the case law since this Court denied certiorari in Bowman that would warrant review in this case.

Moreover, the Endicott decision does not contradict this Court's opinion in Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359 (1952), because Dice did not hold that a FELA[2] plaintiff has the exclusive right to demand a jury trial in state court. Furthermore, Dice, a FELA case, is of little persuasive value on this issue because FELA lacks the jury language included in the Jones Act. Dice also provides little precedential value because FELA litigants were not subject to the traditional bar to a jury trial that existed in admiralty jurisdiction.

Additionally, the United States courts of appeal that have considered the extent of a Jones Act defendant's right to demand a jury have consistently held that where there is a basis for federal court jurisdiction independent of the Jones Act,

[2] Federal Employers' Liability Act, involving injuries to railway employees.

such as diversity, both the plaintiff and the defendant are entitled to demand a jury. If the seaman seeks to bar the Jones Act defendant from demanding a jury, their choice is to bring the case on the admiralty side of the federal court or under the federal question jurisdiction pursuant to the Jones Act. No United States court of appeals has rendered a decision that restricts the Jones Act defendant's right to demand a jury in state court. Instead, the one United States court of appeals that has considered this question held that when the Jones Act plaintiff proceeds in state court, the state procedural rules determine the parties' rights to a jury. Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480 (5th Cir. 1992), cert. denied, 506 U.S. 976 (1992).

As such, there is no conflict between the United States courts of appeal that have considered the Jones Act jury issue. Contrary to Mr. Endicott's assertion, the Ninth Circuit's decision in Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994), does not conflict with decisions from other circuits. Rather, the Ninth Circuit's decision in Craig was limited to whether a defendant has the right to demand a jury in federal court where the Jones Act is the federal court's sole basis for jurisdiction. Id. The Ninth Circuit has never held that a Jones Act defendant cannot demand a jury in state court.

Finally, there is no split on this issue between the state courts of last resort that have considered the issue. The Peters v. City of San Francisco, 1995 AMC 788, 791 (Cal. Ct. App. 1994) (unpublished) case relied upon by Mr. Endicott was not

issued by the state court of last resort and cannot even be cited in the court that issued the opinion. See Cal. R. of Court 8.1115(a). A conflicting unpublished opinion from an intermediate appellate court is insufficient to warrant review by this Court. The only other state court of last resort to consider this issue held that the right to a jury trial is governed by state law when a Jones Act case is brought in state court. See Bowman v. Am. River Transp. Co., 838 N.E.2d 949 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006).

There is no conflict for this Court to settle. Accordingly, the Petition for Writ of Certiorari should be denied.

ARGUMENT

1. The Consequence of Choosing the Forum Under the Jones Act.

Article III, section 2 of the United States Constitution states in part that "[t]he judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ." See also 28 U.S.C. § 1333(1). Cases brought in federal court pursuant to this grant of exclusive admiralty jurisdiction are tried to the bench because, historically, there was no recognized right to a jury in admiralty. See Fed. R. Civ. P. 38(e); Wilmington Trust v. U.S. District Court, 934 F.2d 1026, 1029 (9th Cir. 1991). The federal district courts' admiralty jurisdiction is "exclusive of the courts of the States." 28 U.S.C. § 1333(1). This necessarily means that state courts do not have admiralty jurisdiction and can never decide Jones Act cases in admiralty. "Because admiralty jurisdiction is exclusively federal, a true 'admiralty' claim is never cognizable in state court...." Linton v. Great Lakes Dredge & Dock

Co., 964 F.2d 1480, 1487 (5th Cir. 1992) (citing The Hine, 71 U.S. (4 Wall.) 555, 18 L. Ed. 451 (1866)).

Prior to 1966, the federal courts were divided into common law courts and admiralty courts. Wilmington Trust, 934 F.2d at 1029. In 1966, common law and admiralty courts were merged in the federal system. Id. Federal Rule of Civil Procedure 9(h) allows the pleader to elect "to proceed in admiralty on claims cognizable both in admiralty and the court's general civil jurisdiction." Id. (quoting Fed. R. Civ. P. 9(h) advisory committee's notes to 1966 amendment). "One of the most important procedural consequences [of this election] is that in a civil action either party may demand a jury trial, while in the suit in admiralty there is no right to a jury trial except as provided by statute." Id. (emphasis added). Thus, by pleading the case as one arising in admiralty under Rule 9(h), the plaintiff in federal court effectively has the right to preclude a defendant from having a jury trial.

The Jones Act was enacted in 1920 and allows an injured seaman to pursue negligence remedies in admiralty or at law, "with the right of a trial by jury." 46 U.S.C. § 30104. The Jones Act states in relevant part, "[a] seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right to a jury trial, against the employer." 46 U.S.C. § 30104. As noted by the Illinois Supreme Court,

> [the] "new" substantive rights created by the Jones Act consist solely of a "new" maritime remedy whereby a

> seaman may choose to sue in negligence, and the right [to "elect"] to file that suit either: (1) at law, with the attendant right to a trial by jury; or (2) in admiralty, where there is no right to a trial by jury."

Bowman v. American River Transp. Co., 838 N.E.2d 949, 955 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006).

If Mr. Endicott wanted to preserve his exclusive right to determine a jury or bench trial in this Jones Act case, he should have filed this action in the United States district court, where that exclusive right exists. That is, the plaintiff desiring a bench trial may bring their case in admiralty under 28 U.S.C. § 1333, as there, neither party is entitled to a jury trial. Bowman, 838 N.E.2d at 956-57. Instead, Mr. Endicott pursued this case in the common law courts of the state of Washington, where both parties enjoy the right to elect a trial by jury.

2. **The Washington State Supreme Court's Opinion Does Not Conflict With Dice.**

Icicle agrees that substantive federal maritime law governs suits brought in state courts pursuant to the saving to suitors clause, 28 U.S.C. § 1333(1). Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953). But Dice did not grant Jones Act plaintiffs an exclusive substantive right to elect a jury trial. While FELA cases are instructive in the Jones Act context, Mr. Endicott ignores the fact that FELA does not contain the jury provision language included in the Jones Act. 46 U.S.C. § 30104. Mr. Endicott also ignores the fact that admiralty litigants were traditionally not entitled to a jury, thus making FELA jury cases of little value in

this analysis. See Craig v. Atlantic Richfield Co., 19 F.3d 472, 475 (9th Cir. 1994). Therefore, Dice is neither persuasive nor relevant.

To the extent that Dice does recognize a "substantive" right to a jury, that right is enjoyed by all litigants, and thus supports a Jones Act defendant's right to demand a jury. 342 U.S. at 363; see also Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 340 (1988). In holding that the Dice plaintiff had a right to a jury trial under FELA, this Court found that "[t]he right to trial by a jury is 'a basic and fundamental feature of our system of federal jurisprudence.'" Dice, 342 U.S. at 363. This Court made no distinction, as suggested by Mr. Endicott, that this "basic and fundamental feature" was afforded only to the Jones Act plaintiff. Id.

Instead, Mr. Endicott argues that he is entitled to a "liberal" interpretation of the Jones Act that would bar the defendant from demanding a jury regardless of the plaintiff's chosen forum. He further asserts that he is entitled to the exclusive right to demand a jury because "injured sea personnel do not have the benefit of no-fault worker compensation systems" and "[t]he Jones Act is their only relief for on-the-job injuries." Petition at pp. 4-5 (citing More v. Dept. of Retirement Sys., 137 P.3d 73, 74 n.1 (Wash. Ct. App. 2006)). This assertion is substantively incorrect as it ignores the "no-fault" maintenance and cure benefits that Mr. Endicott himself obtained in this case. See Flunker v. U.S., 528 F.2d 239, 242 (9th Cir. 1975) (maintenance and cure obligates employers to provide room, board, and medical care to a seaman injured on the job, even through no fault of the employer). In any event, such an

assertion, inaccurate or otherwise, does not provide this Court with a basis to accept review.

3. **There is No Conflict Between the Washington State Supreme Court Opinion and the United States Courts of Appeal That Have Considered the Jones Act Jury Question.**

The Washington State Supreme Court's opinion here does not conflict with the Ninth Circuit's decision in Craig v. Atlantic Richfield Co. because Craig did not address whether a Jones Act defendant had the right to demand a jury where the plaintiff pursued claims in state court. 19 F.3d 472. The Craig opinion was limited to the question of whether such a right existed where the Jones Act was the sole basis for the federal court's jurisdiction. In fact, Craig and the subsequent Ghotra decision support the Washington State Supreme Court's determination that the rights of the parties with respect to a jury depend on the Jones Act plaintiff's chosen forum. Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). As noted by the Ninth Circuit,

> [a] plaintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court's admiralty jurisdiction, in federal court under diversity jurisdiction, . . . or in state court. The difference between these choices is mostly procedural; of greatest significance is that **there is no right to a jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court.**

Ghotra, 113 F.3d at 1054 (emphasis added).

Mr. Endicott's reliance on Craig overstates its holding and its application to this case. Craig's rejection of a defendant's right to demand a jury trial was not

absolute. For example, the Craig court acknowledged "both the defendant and the plaintiff have a right to demand a jury trial" when a case is brought pursuant to the federal court's diversity jurisdiction. Craig, 19 F.3d at 476. Had the Ninth Circuit believed that a Jones Act defendant never has a right to demand a jury, this diversity jurisdiction analysis would have been inconsistent with such a holding.

Importantly, the Craig decision did not address a defendant's right to a jury in a Jones Act case proceeding in state court. See 19 F.3d at 475-76. Rather, the Craig court's holding was limited to whether a defendant has a right to demand a jury in federal court where the Jones Act is the "federal court's sole basis for jurisdiction." Craig, 19 F.3d at 475-76 (emphasis added); (citing Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986); Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 n.16 (5th Cir. 1992), cert. denied, 506 U.S. 975 (1992)).

The limited question considered in Craig together with the Ninth Circuit's subsequent Ghotra decision illustrate that the right to demand a jury is preserved for both parties where the Jones Act claim is brought in state court. Accordingly, the Washington State Supreme Court's opinion does not conflict with the Ninth Circuit.

4. **There Is No Conflict Between Decisions of the United States Courts of Appeal.**

Mr. Endicott's assertion that the Ninth's Circuit's decision in Craig conflicts with the Fifth Circuit is misplaced. Craig in fact relied on the Fifth Circuit's decision in Rachal v. Ingram Corp., 795 F.2d 1210. Craig, 19 F.3d at 476. In

state court, "[p]rocedurally, whether he, or the defendant, would have a right to a trial by jury would depend on state civil procedure." Linton, 964 F.2d at 1487 (citation omitted) (emphasis added).

Since Craig is limited to the Jones Act defendant's right to demand a jury where the Jones Act is the sole basis for the federal court's jurisdiction, it does not contradict Rachal or Linton. Moreover, Ghotra makes clear that the Ninth Circuit is in harmony with the Fifth Circuit's Linton opinion. Finally, the Craig court cited Rachal and Linton without exception. In sum, the Craig decision did not create substantive maritime law prohibiting a Jones Act defendant from demanding a jury trial where the Jones Act plaintiff decides to file claims in state court pursuant to the saving to suitors clause.

Finally, Mr. Endicott's assertion that the Seventh Circuit's per curiam Wingerter opinion creates a conflict with the Ninth Circuit is without merit for at least two reasons. First, the Wingerter footnote cited by Mr. Endicott actually cites the Ninth Circuit's Ghotra case as authority. See Petition at p. 8 (citing Wingerter v. Chester Quarry Co., 185 F.3d 657, 665-68 & n.5 (7th Cir. 1999) (per curiam)). Second, the Wingerter court ultimately concluded it did not have jurisdiction to consider the appeal and passed on the issue of whether a Jones Act defendant has the right to demand a jury. Wingerter, 185 F.3d at 671 n.9. Accordingly, Mr. Endicott has failed to show a conflict justifying this Court's review.

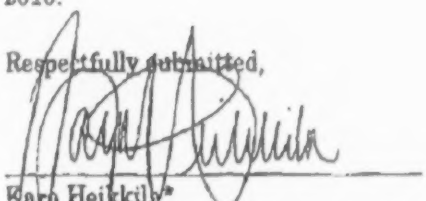
5. **There is No Split Between the State Courts of Last Resort That Have Considered the Jones Act Jury Question.**

The only state courts of last resort to consider the Jones Act jury question, Washington and Illinois, have both concluded that the availability of a jury depends on the law of the chosen forum. See Endicott v. Icicle Seafoods, Inc., 224 P.3d 761 (Wash. 2010); Bowman v. Am. River Transp. Co., 838 N.E.2d 949 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006). The Washington Supreme Court is the only state court of last resort to consider this question since this Court denied certiorari on the Bowman case in 2006. Since the Washington Supreme Court unanimously adopted the reasoning of the Illinois Supreme Court, review by this Court is not appropriate.

Due to the lack of conflict between state courts of last resort, Mr. Endicott cites a conflict between the Washington State Supreme Court decision and an unpublished California Court of Appeals case, Peters v. San Francisco, 1995 AMC 788, 791 (Cal Ct. App. 1994) (unpublished). The Peters case was not issued by a state court of last resort and cannot even be cited in the court that issued the opinion. Cal. R. of Court 8.1115(a). An unpublished opinion from an intermediate state appellate court is insufficient to create a conflict sufficient for this Court to grant certiorari pursuant to Rule 10(b). Additionally, Mr. Endicott suggests there is an "intrastate" conflict between intermediate Illinois appellate courts, which was in fact resolved by the Illinois Supreme Court in Bowman, 838 N.E.2d 949, cert. denied, 547 U.S. 1040 (2006). An "intrastate" conflict resolved by the state court of

DATED this 14 day of May, 2010.

Respectfully submitted,



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